

IN THE MATTER OF a Board of Inquiry appointed pursuant to the
Human Rights Code, R.S.O. 1990, c. H-19.

B E T W E E N

JUDITH GRAY

Complainant

and

A & W FOOD SERVICE OF CANADA LTD.,

AL CLUNAS

and

DOMINIC MONTESANO

Respondents

Date of Complaint: April 3, 1991.

Hearing: Toronto, Ont., March 14, 15, 16, 21, 22, 1994.

Board of Inquiry: Lorne Slotnick

Counsel: Catherine Bickley, for Ontario Human Rights Commission.
Jenny Stephenson, for Respondents.

Judith Gray is a black woman who was fired in November, 1990, from her position as manager of an A & W restaurant in Toronto. In this complaint, she alleges that her firing was at least partly motivated by her race or colour, contrary to the Human Rights Code which (in Section 5 (1)) states that "every person has a right to equal treatment with respect to employment without discrimination because of race ... (or) colour...."

There are more than 400 A & W restaurants in Canada, about 1/3 of them operated by A & W Food Services of Canada Ltd., and the rest as franchises. (The complaint lists A & W Food Service of Canada Ltd. as a respondent; the correct name of the company is A & W Food Services of Canada Ltd. This was not raised at the hearing, and I order the complaint amended to reflect the correct name.)

Each of the corporate-owned restaurants has a manager who is responsible for the day-to-day operation of the outlet, including hiring and scheduling hourly-paid staff such as cashiers and cooks. Larger outlets also often have an assistant manager and a supervisor working under the manager. The restaurant manager reports to an area manager, who is responsible for overall operations at several locations. The area manager, in turn, reports to a regional manager, who oversees a large number of

outlets.

When she was fired, Ms Gray was manager of the A & W outlet at the downtown Toronto-Dominion Centre. Her area manager was Dominic Montesano, who was responsible in 1990 for six restaurants in downtown Toronto. His regional manager was Al Clunas, whose territory was Ontario and Montreal. Both men, who are respondents in this complaint, are white.

Ms Gray had already worked for an A & W franchise in Nova Scotia for seven years when she came to Toronto and began working as a supervisor at one of the corporate-operated restaurants in 1983. She became an assistant manager in 1985, and the next year was transferred to a new location, First Canadian Place, as manager. In 1989 she was transferred to the Toronto-Dominion location, which had about a dozen hourly-paid staff.

Managers received a salary and were also eligible for a bonus of up to 30% of salary based on three factors: how the financial results of the outlet compared with its plan; the area manager's assessment of the operation; and independently performed "friendliness audits," in which an employee of an auditing firm orders food at the restaurant and scores employees on their friendliness.

Ms Gray's area manager from 1986 until early 1990 was Les

Chaboyer. During this period, she received very favourable ratings on the detailed performance appraisal forms used by the company, and she regularly collected substantial bonuses. She appeared to be well on her way to a long and successful career with A & W.

But things began to sour after Mr. Chaboyer left the company in early 1990. For a few months before Mr. Montesano was hired to replace Mr. Chaboyer, Mr. Clunas filled in, handling both the regional and area managers' duties.

Area managers regularly visit the restaurants in their territory to talk to the managers. During one visit, Ms Gray recounts Mr. Clunas telling her she should hire more white people because they look better at the front counter. She says he added that it was all right to have black employees as long as they were working in the back. Around this time, she said, the hourly paid staff consisted of five blacks, one Indian, one Chinese, and three or four whites; at the particular time Mr. Clunas made the comment, the counter was staffed by two blacks and one white. Ms Gray testified that the comment was the only issue mentioned during the visit and that it appeared to be a very serious instruction from Mr. Clunas.

Mr. Clunas acknowledges the comment but has a different version of the situation. He said the comment was made at the end of a fairly long meeting to discuss staffing, scheduling,

expenditures and other issues. He said that as he was about to leave, he noticed the largely white crowd at the Toronto-Dominion Centre and told Ms Gray that "we may want to consider keeping a racial mix at our counter" in order to "form some more effective bonds" with the customers. He said he recalls telling Ms Gray that when she is interviewing people, she might want to keep in mind having a more balanced racial mix at the counter. Mr. Clunas denies ever saying anything about blacks being all right to work in the kitchen.

Ms Gray said this is the only time Mr. Clunas ever mentioned race or made a comment that could be construed as discriminatory.

Later in 1990, Mr. Montesano was hired -- from outside A & W -- as area manager. He first met Ms Gray when he toured his new territory with Mr. Clunas during the summer. The day after this first introduction, Ms Gray said, Mr. Montesano came to her restaurant alone and Ms Gray described the meeting as immediately confrontational. She said one of the first things Mr. Montesano said was that the two of them were not going to get along. He also said he didn't like her, Ms Gray said.

Mr. Montesano denies these statements, but it is clear that he was very critical of Ms Gray right from the beginning. Within a few weeks of his start at A & W, Mr. Montesano had issued a memo to Ms Gray which told her to put in place some detailed cost

control measures, accused her of being "very defensive and closed-minded", adding: "we ask you to decide whether A & W's the company you wish to be employed by."

A few weeks later, Mr. Montesano gave Ms Gray another memo outlining nearly 40 "priorities and objectives" for her restaurant, some of which were general rules applicable to all restaurants and some of which were specific areas where Ms Gray's outlet was perceived to be below standard.

A month later, Ms Gray received a third memo, evaluating her performance of the tasks outlined in the previous memo. This memo is more positive in tone, noting that many items had been improved, and ends with this statement: "In summary, I'd like to say that although you still come across as being a 'little sceptical' I have noticed an improvement in your attitude and would encourage that you continue in this direction."

The first memo was in late August of 1990. By mid-November, Ms Gray was called into the company office and told that Mr. Montesano had decided to fire her. She was replaced with a white manager. A letter from the company's director of human resources says "we felt that the performance difficulties you had encountered were significant and persistent."

Ms Gray says she is convinced that the firing was racially

motivated. There is only one piece of direct evidence of a racial nature, and that is the comment by Mr. Clunas about black employees at the counter.

The rest of Ms Gray's evidence is circumstantial: she says Mr. Montesano had no reason other than race to dislike her; she points to her favourable performance appraisals and her ability to collect bonuses, even after Mr. Montesano started; she says Mr. Montesano told her to keep her mouth shut at meetings with other restaurant managers; she says Mr. Montesano asked her on one occasion where she was from; she says he left notes regularly with instructions, which she called a form of harassment; and she says he was particularly critical of black employees when pointing out problems such as slow service and staff leaning on the counter rather than working.

Ms Gray also points to an incident regarding Sharon Grantison, one of the black employees. Ms Gray had received permission -- from Mr. Clunas, it should be noted -- to train Ms Grantison as an assistant manager. Ms Gray says Mr. Montesano ordered her out of the training programme because she had a "bad attitude."

Mr. Montesano denies all of the allegations suggesting that Ms Gray's race or colour were a factor in any of his decisions. In brief, the company's reasons for the firing are as follows: that sales had been dropping at A & W restaurants in downtown Toronto,

and that the drop at Ms Gray's restaurant was particularly severe; that Mr. Montesano was hired with a clear mandate to deal with this problem, and decided that one of the main solutions was to improve service to customers; that Ms Gray's confrontational attitude and reluctance to acknowledge problems was a major barrier to this goal; and that the company decided that Ms Gray was unwilling to remedy her faults, so she had to be terminated.

In a case such as this, Ms Gray need only to show that her race or colour was simply one factor -- and not necessarily the only factor -- influencing the decision to dismiss her, in order to prove a violation of the Code. (See for example, Holden v. Canadian National Railway (1990) 14 C.H.R.R. D/12 (Fed. Ct. of Appeal)).

Ms Gray bore the burden of establishing a *prima facie* case of discrimination, which A & W acknowledged she had discharged. The onus then shifted to A & W to provide a credible alternative explanation for its actions. This explanation must not be a pretext to cover up a discriminatory motive.

I accept the formulation for dealing with circumstantial evidence stated by Beatrice Vizkelety in her book Proving Discrimination in Canada, which has been cited in several cases, including Basi v. Canadian National Railway Co. (1988) 9 C.H.R.R. D/5029 (Cdn. Human Rights Trib.):

...an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.

Particularly where the defining factor is race or colour, it is extremely rare today that an employer will admit discrimination in hiring, firing or granting promotions. Many instances of racial discrimination in employment may, in fact, be quite unintentional: employers who subconsciously make judgments based on stereotypes rather than judging people on their individual qualities; or employers who decide that an employee is not a "team player" or that there is a "personality conflict" when, on closer examination, there is discomfort with that employee's race, or accent, or religious customs, or an expectation that members of certain groups should not be assertive. Such forms of discrimination may be unintentional but they are still as damaging to the victims and still illegal under the Human Rights Code.

As the Ontario Court of Appeal said in a recent criminal case, R. v. Parks (1993) 15 O.R. (3d) 324,

Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil.

This is hardly news to the victims of racism. But it is significant that the Court of Appeal has recognized the depth of discriminatory attitudes.

For these reasons, a Board of Inquiry must scrutinize very carefully the reasons given by an employer such as A & W for its actions in dismissing a black employee where that employee has raised evidence that might point to a racial motivation.

In this type of case, the testimony of other black employees and former employees is particularly valuable in assessing the credibility of the reasons offered by the employer for dismissing a black employee.

One black A & W employee who was called to testify on Ms Gray's behalf was her sister, Angela MacKay. Ms MacKay has worked for A & W for seven years and is currently the manager of one of the downtown locations in Mr. Montesano's jurisdiction. With both her boss and her sister in the hearing room on different sides of the case, Ms MacKay was in a touchy situation.

Ms MacKay disagreed with the company's suggestion that Ms Gray was disruptive and sarcastic at meetings, saying everyone interrupted Mr. Montesano at one time or another. She said she was shocked by Ms Gray's firing and hadn't seen anything that would cause it. She was worried about her own status, since she knew that

Ms Gray was meeting her sales targets while she, Ms MacKay, wasn't. She said that at a recent convention of Ontario A & W restaurant managers, she was the only black woman out of nearly 150 participants, and there were two black men. She said she feels that she has advanced as far as she can at A & W, although it is noteworthy that when she was asked why she felt that way, she did not mention race or colour.

On cross-examination, Ms MacKay said Mr. Montesano's approach made it difficult for everyone, because he was a "numbers man." She described him as not very good with people, blunt, and not concerned with the reasons for a problem but just the numbers.

In the end, I felt Ms MacKay's evidence assisted neither side. She did not say she felt that race was a factor in her sister's firing, leading me to believe that she feels her sister was treated unfairly but not necessarily in a discriminatory manner.

Another black manager in Mr. Montesano's area is Kurt James. He testified for the company. Mr. James was hired in early 1990 as an assistant manager trainee at Ms Gray's restaurant. He said he did not get along with Ms Gray, partly because he felt she was not giving him the training he was supposed to be receiving. He requested a transfer and was moved to First Canadian Place, where he trained under Philip Johnson, another black manager. He denied a statement by Ms Gray that the reason they did not get along is

that she refused his invitations to go out together.

Mr. James said he has never felt that he or other black employees have been subjected to discrimination by Mr. Montesano. His outlet is a small one, and he described the current staff as one Oriental, one Somali and one Ethiopian.

Jackie Nelson is another black employee who testified for the company. He has been with A & W for 22 years and is currently an area manager, the same position as Mr. Montesano holds. Both he and Mr. Clunas started with the company in Montreal and have known each other for two decades. He said he and Mr. Clunas are "very very close" friends, that Mr. Clunas "has been like a brother" and that he has never known Mr. Clunas to be a racist. He was not asked about Mr. Montesano.

The final black witness was Philip Johnson. Unlike the others, he is no longer with A & W. It cannot be said that he has anything to fear by being critical of the company. Mr. Johnson started as a manager in 1987 and was at First Canadian Place when Mr. Montesano began with the company. He was transferred to the Yonge and Edward restaurant, still within Mr. Montesano's territory. All witnesses agreed that this restaurant was particularly difficult because of its long hours and the sometimes gamy scene on the Yonge Street Strip. After a few months, the company decided Mr. Johnson did not have what it takes to run the location and transferred him

to a more sedate spot outside Mr. Montesano's area, still as a manager.

Mr. Johnson said he did not see this as a demotion and disagreed with a suggestion in Ms Gray's complaint that he was transferred out of Mr. Montesano's area because he is black. He said he never felt that either Mr. Montesano or Mr. Clunas treated anyone differently because of colour. Mr. Johnson eventually was promoted to A & W's head office in North Vancouver as a marketing analyst before leaving the company.

The testimony of these witnesses tends to undermine Ms Gray's contention that race or colour were a factor in her dismissal. They do not dispose of it completely, however. It is not unknown for individuals or organizations that have discriminatory attitudes or practices to tolerate blacks as long as they are submissive or "know their place." This is not to suggest that either Ms MacKay, Mr. James, Mr. Nelson or Mr. Johnson was submissive; there was no evidence for me to offer an opinion on whether Ms Gray was more assertive than other black employees -- but she may have been.

It is therefore important to examine the company's claim that Ms Gray was disruptive, confrontational and unwilling to accept criticism. Even if this claim is true, I must also assess whether it is the real and entire reason for the firing or merely a pretext to cover up an element of racial bias.

Mr. Montesano's evidence is that he realized soon after he began with A & W that its standards for friendliness, cost controls and other issues were not being met in downtown Toronto. He said that as soon as he asked for changes at Ms Gray's outlet, he met with resistance. Ms Gray's attitude, he said, was that "it's everybody else's problem but not mine." He said she disrupted managers' meetings with sarcastic comments.

Mr. Montesano said he encourages open communication and supports employees who challenge and question policies, in keeping with the company's written philosophy, but said Ms Gray's contributions were not constructive. "She knew it all... Nobody could teach her anything more," he said. "That's how she came across to me."

He denied leaving notes at Ms Gray's restaurant, harassing her in any way, or telling her to shut up in meetings or that he did not like her. He also denied being more critical of black employees than whites, and recalled criticizing a white employee named Tim McCarthy at Ms Gray's restaurant who he said was too slow to work the front counter; he said he eventually fired Mr. McCarthy. Mr. Montesano said he recommended that Ms MacKay be promoted to manager, and also that another black employee, Mr. Johnson, be put in the Yonge and Edward location because he was the best manager for a tough outlet. He said Ms Grantison was taken out

of the assistant managers' training programme because she was unwilling to be transferred to other locations, a clear requirement of the programme; it had nothing to do with her "attitude." He added that after Ms Gray left, Ms Grantison had problems getting along with the new manager, who wanted to fire her, but Mr. Montesano recommended that she be moved to another restaurant, which was done.

Mr. Montesano said that after a few months on the job it became clear that effective communication between him and Ms Gray was impossible, so he recommended to Mr. Clunas that she be fired.

Much of Mr. Montesano's evidence was, not surprisingly, corroborated by Mr. Clunas. More significant is that other witnesses tended to confirm portions of Mr. Montesano's evidence.

Michael Nelson, who is Jackie Nelson's half-brother but who is white, is a former restaurant manager who left A & W in 1991. He hired Ms Gray when she started with the company in Toronto. He said he has never felt that there was any racism at A & W, and in particular he said he never heard Mr. Clunas or Mr. Montesano make any racial comments. Mr. Nelson was at some of the managers' meetings with Mr. Montesano and Ms Gray, and described Ms Gray as very vocal and said she would shrug her shoulders and bat her eyes if she didn't like something that was said. He said he perceived that she was not interested in what Mr. Montesano was saying. Mr.

Nelson also said Mr. Montesano's style was very different from that of his predecessor, Mr. Chaboyer; he described Mr. Montesano as stricter with everyone, and "more by the book" but not treating non-white employees -- Mr. James, Ms MacKay, and Stella, a manager of Filipino origin -- differently from whites.

Mr. Chaboyer also testified, and like Mr. Johnson, has nothing to fear from criticizing A & W, particularly since it appears he was squeezed out of the company by Mr. Clunas in 1990. Despite his glowing performance reviews of Ms Gray, he said he had some concerns that did not show up on her evaluation, which emphasized quantifiable performance measures such as sales targets, costs, etc.

Mr. Chaboyer said Ms Gray could be very confrontational and did not like criticism. She would deny that any changes were required and responded in a very curt way, he said. On several occasions, he added, he talked to her about her "basic stubbornness", and once discussed her response to criticism in a meeting that Mr. Clunas attended in the summer of 1989. He said at this meeting there was "a blanket refusal to accept our point of view."

Mr. Chaboyer said Ms Gray was capable of being very sarcastic and he found that irritating, but said the two were able to get along because they had a basic respect for each other.

A final piece of evidence that tends to corroborate these impressions of Ms Gray is a June, 1990, letter of complaint from a customer at her restaurant who found what appeared to be a cockroach leg in his hash browns. The company's clear policy is that the customer is never wrong and complaints are to be dealt with cheerfully, but the customer's letter says the manager denied the incident. "She said it couldn't have come from them as she 'had just changed the oil yesterday,'" the letter says. "She didn't bother to apologize and as a result I demanded my money back. Her reaction was to sarcastically tell her employee to 'give 'em his money back' and then she stormed off." Ms Gray said she recalled the incident, saying the reason the exchange was not friendly was that the customer was yelling and swearing. However, she said she did apologize to the customer.

It is difficult to make any judgments about Ms Gray's personality from watching her for only a few hours at a hearing, but it is clear she is no diplomat. I say this not to suggest that A & W was justified in firing her, but rather to make the point that the descriptions provided by most of the witnesses on her conduct at meetings and on the job ring true. Ms Gray maintains, however, that she was open and receptive to criticism.

As a witness, I found that Ms Gray was sometimes willing to stretch the facts to fit her contention that A & W's actions were

motivated by racial considerations. An example was her testimony about Ms Grantison, who, she said flatly, was not made an assistant manager because she was black. However, on cross-examination Ms Gray admitted that willingness to transfer was clearly a requirement of the job and that Ms Grantison was unwilling to be transferred.

I also believe it is unlikely that certain conversations happened in the way Ms Gray described them. I find it hard to believe that Mr. Montesano would have told Ms Gray he didn't like her on their first meeting alone. Similarly, it is difficult to believe Ms Gray when she says Mr. Clunas mentioned no other matters with her on the day he made the comment about the racial mix at the counter.

Consequently, I believe that some of the circumstantial evidence does not point nearly as clearly to a racial motivation as Ms Gray alleges.

Aside from Mr. Clunas's comment about the racial mix at the counter, Ms Gray acknowledges that she has "no actual proof" of a racial motivation. She has tried to fit most of the events at her workplace in 1990 into her gut belief that she was fired because she is black. I do not dismiss such a "gut reaction" lightly: often, members of groups that are regularly subjected to discriminatory conduct develop a sixth sense about how people deal

with them and whether it is influenced by discriminatory attitudes.

But these "gut reactions" can be wrong, and in a hearing such as this, a violation of the Code must be proven, on the balance of probabilities, from all the surrounding circumstances. In this regard, I place significant weight on the testimony of the other black employees and former employees of A & W, and their evidence that they found no racial bias.

With respect to Mr. Clunas's comment, I tend to believe his version of the event rather than Ms Gray's. For one thing, if the comment had been as serious an instruction as Ms Gray alleged, I would have expected some follow-up. But there is no evidence the matter was ever raised again, and in fact, Ms Gray appears to have ignored any direction to decrease the proportion of non-whites at the counter, which, of course, is to her credit.

The question remains whether Mr. Clunas's comment can be linked to the firing. I have concluded from all the surrounding circumstances that it cannot. I accept the company's evidence that Mr. Montesano made the decision to fire Ms Gray, although it is clear that his judgment of Ms Gray, given his short tenure at the company by that time, was influenced by Mr. Clunas's views. But long before Mr. Clunas made the comment, the evidence indicates that he, along with Mr. Chaboyer, had concerns about Ms Gray. Had Mr. Clunas wanted to fire Ms Gray, he could have done so before

Mr. Montesano started with the company. But he did not, and in fact Ms Gray acknowledged that she had no problems with her employment until Mr. Montesano came along. These facts lead me to believe that Mr. Clunas did not make the decision to fire Ms Gray and that his comment and the beliefs that underlie it cannot be linked to the firing.

Consequently, I have concluded that Ms Gray's firing does not violate the Human Rights Code. This is not to pass any comment on whether the firing was fair, or whether Ms Gray should have been offered a transfer out of Mr. Montesano's area, or whether A & W lived up to its written philosophy of encouraging employees to have a mind of their own; this hearing can pass no judgment on those issues, only on whether the Human Rights Code was violated.

Counsel for the Commission urged me to find that Mr. Clunas's comment by itself was a violation of the Code. The argument is that the discriminatory attitudes exhibited in the comment affected the emotional and psychological environment of the workplace for Ms Gray and thus deprived her of her right to equal treatment with respect to employment. Counsel points to cases (such as Ghosh v. Douglas Inc. (1992) 17 C.H.R.R. D/216 (Ont. Bd. of Inq.) that make it clear that the impact of comments or conduct of a discriminatory

nature must be assessed from the point of view of the minority

member.

Mr. Clunas's suggestion that the counter staff be more "balanced" racially is deplorable. I find it startling that a senior official of a large and sophisticated company such as A & W would pander to some perceived bias by customers as to who should serve them at a fast-food counter. As counsel for the Commission pointed out, it is clear from many human rights decisions that the preference of customers is no justification for discriminatory conduct. It is equally surprising if Mr. Clunas made such a comment to a black employee and did not expect that the employee would be hurt and offended. Ms Gray testified that she was very disappointed by the comment and wondered about her own status with Mr. Clunas and the company, and this reaction is understandable.

But in the absence of any other comments of a discriminatory nature, I cannot find that one statement by a manager who was just visiting the location on the day in question poisoned the atmosphere in the workplace enough to constitute a violation of the Code.

Counsel for the company said the evidence shows that Mr. Clunas's comment is not representative of his attitude toward black people. Indeed, it could be argued -- although it was not -- that

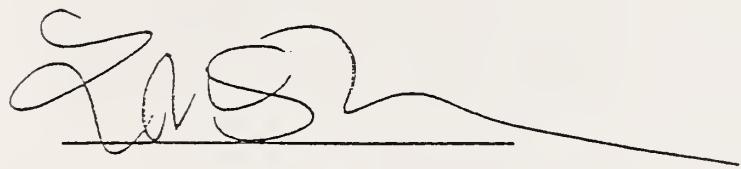
Mr. Clunas was commenting only on how the business should adapt to the discriminatory attitudes of other whites.

A & W counsel pointed to some cases (such as Almeida v. Chubb (1984) 5 C.H.R.R. D/2104 and Mitchell v. Nabilium Products (1982) 3 C.H.R.R. D/641) which make the distinction between discriminatory attitudes and discriminatory actions. The fact that a person has a discriminatory attitude does not necessarily mean that his or her actions toward a member of that group will contain a discriminatory component.

Counsel for the Human Rights Commission correctly pointed out that these decisions were made before it was clear that intention was not necessarily a prerequisite to discriminatory actions. With the O'Malley v. Simpsons Sears case (1986) 7 C.H.R.R. D/3102 (S.C.C.), it became clear that intention is not necessary to establish a violation of the Code. In other words, "innocent" conduct may still violate the Code. But it is still useful and important to distinguish between attitudes and actions, although sometimes the distinction may be difficult. Sometimes attitudes can manifest themselves in persistent comments that affect an employee's conditions of work, hence the Code's prohibition against harassment on the basis of race etc. But I cannot find that the discriminatory attitude exhibited in Mr. Clunas's one comment had any actual effect on Ms Gray's right to equal treatment in

employment, or any alteration of the conditions of her employment,
in the absence of any other comments or conduct of a discriminatory
nature.

For the above reasons, the complaint is dismissed.

A handwritten signature in black ink, appearing to read "JNS". It is written in a cursive, flowing style with a long, sweeping line extending from the end of the "S" towards the right.

Jerome Slotnick,
Board of Inquiry

May 12, 1994

Date

